(6)

No. 97-501

In The

Supreme Court of the United States

October Term, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether an arrest that is supported by probable cause is per se unreasonable under the Fourth Amendment solely because the underlying offense is punishable by a fine and not by incarceration.

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STATEMENT

1. An ordinance adopted by the Village of Arlington Heights, Illinois, makes it "unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business" within the Village "without first having obtained a license for such business" (Section 9-201; see J.A. 16).[1] A violation of the ordinance was, at the time of the events in this case, punishable by a fine of up to $500.00 for "each day during or on which a violation occurs or continues" (J.A. 16).

On April 19, 1994, two Arlington Heights police officers executed an arrest warrant at the business premises of a telemarketing firm named Rudeway Enterprises. The warrant named one Daniel Dugo, who was employed by Rudeway Enterprises. Pet. App. 12; J.A. 49, 61-62. The Arlington Heights Police Department had previously received complaints that Rudeway Enterprises used "high pressure" telemarketing tactics and represented itself as authorized to solicit on behalf of the Arlington Heights Police Department. J.A. 20, 18-19. Before executing the warrant at the premises of Rudeway Enterprises, the Arlington Heights officers had determined that no business license had been issued for that firm. See J.A. 22, 37.

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[1] Section 9-201 applies to any business "for which a license is required." Section 14-3001, at the time of petitioner's arrest, required a license for "[t]he places of business hereinafter enumerated in Section 14-3002" (J.A. 15); Section 14-3002 listed a number of businesses specifically and then "[a]ny and all business enterprises not named elsewhere in this Code." J.A. 16. Petitioner argued below that he was not required to have a license, but the district court rejected that argument (Pet. App. 15) and petitioner has not challenged that ruling.

After arresting Dugo pursuant to the warrant, the officers interviewed petitioner, who owns Rudeway Enterprises and who was on the premises at the time. Pet. App. 2. Petitioner told the officers that Rudeway was a telephone solicitation business. J.A. 64.[2] When petitioner was unable to produce an appropriate license, the officers told him that he was in violation of the Village ordinance and that he would be issued a citation at police headquarters. J.A. 65. Officer Whowell, who had primary responsibility for the case, explained his exchange with petitioner as follows (J.A. 65-66):

> I told him that based on the village ordinance requirement I requested that he accompany me to the Arlington Heights Police Department and I explained to him the procedure [t]hat was going to take place, that fact that he would be issued a citation.
>
> * * *
>
> I indicated to him that [] specifically that he would be issued a citation for not having a village license. I indicated to him that we would need to go to the police department to do that. I asked him if he was in a position to accompany me there, and he indicated that he was. And that's when he was escorted back to the police department.

The officer subsequently explained that he took petitioner to the police station because "our department policy does not allow us to take any type of monetary bond or to issue a recognizance bond on the street. That has to be

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[2] It is not clear from the record how many employees Rudeway had at the time of petitioner's arrest. Six months earlier the firm had 20 employees. Ricci Dep. 11. ("Ricci Dep." refers to petitioner's deposition.)

done at the police department." J.A. 66. Petitioner was not handcuffed. J.A. 66; Ricci Dep. 32.

At the station, the arresting officers completed an arrest report, a citation, and a bond receipt. J.A. 69. Petitioner was photographed, but he was not fingerprinted. J.A. 38. The arresting officer asked the Sergeant on Duty to release petitioner on a recognizance bond, and the Sergeant agreed to do so. J.A. 73. While this process was being completed, petitioner remained in an interview room. J.A. 68. After the officers completed the necessary forms, petitioner was released on a recognizance bond. He was detained for a total of approximately one hour. J.A. 41-42; Pet. App. 12.

After his arrest, petitioner's wife obtained a Village license for the firm. Pet. App. 12. Because he had a valid license at the time of his appearance in court, the charges against him were dismissed. Pet. App. 12.

2. Petitioner then brought this action under 42 U.S.C. 1983 in the United States District Court for the Northern District of Illinois, seeking damages from both the Village and the officers. Petitioner alleged that his arrest violated the Fourth Amendment; that the arrest was made pursuant to a Village policy that violated the Fourth Amendment; and that Officer Whowell had conducted an unlawful search. The district court denied the defendants' motion for summary judgment on the count pertaining to the allegedly unlawful search, but noted that "[t]he only evidence" of an unlawful search was petitioner's claim, denied by Officer Whowell, that the officer "pick[ed] up and inspect[ed] a 3x5 index card off a desk" (Pet. App. 13). The district court ruled that petitioner had shown no compensable injury in connection with the search (*id.* at 14).

The district court granted summary judgment to all defendants on all issues related to petitioner's arrest. Pet. App. 15-19. The court specifically rejected petitioner's claim that his arrest violated the Fourth Amendment. The court ruled that Arlington Heights ordinances forbade petitioner to operate a telemarketing business without a license, and noted that "[t]he officers observed [petitioner] committing this unlawful act." Pet. App. 15-16. Accordingly, the district court held, the officers had probable cause to arrest petitioner. Pet. App. 16.

The district court then rejected petitioner's argument that the Village violated the Fourth Amendment by adopting a policy requiring what petitioner termed "full custodial arrests" for violations of the business license ordinance. Pet. App. 16. The district court noted that the Fourth and Ninth Circuits had both rejected arguments that the Fourth Amendment prohibits law enforcement officers, acting with probable cause, from arresting a person who has committed a misdemeanor. Pet. App. 16-17. The district court also ruled that even if the Fourth Amendment's requirement of reasonableness "incorporate[d] * * * the common law rule requiring an officer to witness a misdemeanor before arresting someone for it," the arrest of petitioner would still have been lawful because petitioner "committed his offense * * * in the presence of [the o]fficers" (Pet. App. 18).

The claim pertaining to the unlawful search was subsequently settled, and that count of the complaint was dismissed. Pet. App. 3; J.A. 2. Petitioner did not appeal the grant of summary judgment in favor of the officers. Pet. App. 3.

3. The court of appeals affirmed the grant of summary judgment in favor of the Village. Pet. App. 1-9. The

court of appeals first noted that, as the district court had said, petitioner's arrest "comports with the common law rule" because petitioner had "committed the offense in the officers' presence." Pet. App. 6. The court rejected petitioner's argument that the Village also had to show that the offense constituted a breach of the peace, noting that "the common law rule has been relaxed to include offenses other than breaches of the peace." Pet. App. 6.

The court then reviewed the circumstances of petitioner's arrest and held that the officers' conduct was reasonable. Pet. App. 7. The court explained that, because fines under the Village's ordinance accrue daily, "[b]y the time he was arrested, [petitioner] was facing a potential fine of tens of thousands of dollars." Pet. App. 7.[3] In addition, the court explained, petitioner "admitted to the officers that he was currently violating the [ordinance,]" and "[t]he officers held him for only one hour, the length of time it took to process the paperwork associated with the arrest." Pet. App. 7. The court concluded that "[w]e cannot call such an arrest unreasonable for Fourth Amendment purposes." Pet. App. 7.

The court of appeals "decline[d] to set a per se rule" that the Fourth Amendment bars all arrests for "offense[s] punishable by fine only, where the offense does not constitute a breach of the peace." Pet. App. 7, 5. The court of appeals noted that the reasonableness requirement of the Fourth Amendment ordinarily requires an assessment of the particular facts of each case, and that when the police have probable cause to arrest a

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[3] According to petitioner's deposition, his firm had been operating in Arlington Heights since October 1993. Ricci Dep. 10.

suspect, the arrest is reasonable in the absence of "extraordinary" circumstances. Pet. App. 7-8. The court specifically refused to consider petitioner's argument that the arrest violated the Warrant Clause of the Fourth Amendment, holding that petitioner had "waived this argument by not addressing it in his brief." Pet. App. 8.

SUMMARY OF ARGUMENT

A. Petitioner's arrest was based on probable cause. It was carried out in a reasonable manner, and it was not excessive in duration. The Fourth Amendment requires no more than that. This Court has never invalidated an arrest, based on probable cause, in these circumstances.

B. A per se rule restricting arrests for "minor" offenses would be unworkable, and is in any event unnecessary.

1. The rule petitioner advocates would force officers, acting with probable cause, either to release suspects with a citation – thus increasing the chances that they will abscond – or to assess and collect a bond on the scene of the arrest, something that officers in the field are ill-equipped to do. Among other things, individuals arrested for minor crimes can have records that include far more serious offenses, and officers in the field will not routinely have access to that information.

In addition, an arrest is often needed to maintain control of a dangerous situation, which can develop whenever the police encounter a suspect on the street – even if the charge against the suspect is for a relatively minor crime.

2. The profusion and variety of state laws governing arrests for misdemeanors and fine-only offenses shows that this Court's intervention is not needed. States

have addressed this issue in ways that suit their particular circumstances. Moreover, the complexity of many state schemes is the best evidence that a simple per se rule, applied nationwide as a matter of constitutional law, is not appropriate. In addition, police officers have no incentive to create additional paperwork for themselves by arresting people unnecessarily for minor offenses. The possibility that arrests will be made pretextually or for purposes of harassment is poorly addressed by an across-the-board rule of the kind petitioner advocates.

3. Petitioner's implicit denigration of the importance of enforcing laws against "minor" offenses flies in the face of both social science and the realities of law enforcement, especially in urban areas. The effective enforcement of misdemeanors and fine-only offenses – something that cannot be accomplished if the police are limited to handing out frequently-ignored citations – is one of the most powerful tools in maintaining stable and safe urban communities.

C. The common law background of the law of arrest does not support petitioner's claim. It has always been understood, both in England and in this country, that the common law of arrest can be modified by statute. In any event, the traditional limits on arrests for misdemeanors have survived in this country only to the extent that they require the offense to have occurred in the presence of the arresting officer. Petitioner's offense did occur in the presence of the officers who arrested him.

ARGUMENT

AN ARREST SUPPORTED BY PROBABLE CAUSE DOES NOT VIOLATE THE FOURTH AMENDMENT MERELY BECAUSE THE UNDERLYING OFFENSE IS PUNISHABLE ONLY BY A FINE.

A. An Arrest That Is Based On Probable Cause And Is Reasonable In Manner And Duration Satisfies The Fourth Amendment.

1. In more than 200 years, this Court has never invalidated an arrest that was based on probable cause. See *United States v. Watson*, 423 U.S. 411, 417-18 (1976), quoting *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). "A police officer may arrest a person if he has probable cause to believe that person committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). When officers enter a dwelling in order to effect an arrest, the Court has held that a warrant, as well as probable cause, is ordinarily needed. See *Payton v. New York*, 445 U.S. 573 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). But the warrant is required because of "the breach of the entrance to an individual's home" (*Payton*, 445 U.S. at 589) – not because of the arrest. When police officers are in a place where they have a right to be, the Court has never required more than probable cause to sustain an arrest.

In such circumstances, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 113-14. That, of course, describes exactly what the Arlington Heights officers did in this case. "Where probable cause has existed," the Fourth Amendment is offended only by "seizures

conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996).

2. The courts below determined that the police officers' conduct in this case – far from being "extraordinary" or "unusually harmful" to petitioner's legitimate interests – was fully reasonable. Pet. App. 7, 16-17. The officers who arrested petitioner had probable cause to believe him guilty of an offense. Indeed they were, for all practical purposes, certain of his guilt, on the basis both of evidence they themselves had seen and of petitioner's admissions. Petitioner was facing a substantial fine. An individual on his business premises, whom petitioner employed, had just been arrested on a valid arrest warrant.[4]

The officers never handcuffed petitioner. There is no indication in the record that he was either patted down or searched, or that the business premises were searched incident to arrest.[5] Petitioner's account of his arrest is as follows (Ricci Dep. 31):

> [The officer] told me that he didn't think I had [a license] and that they were going to bring me down to the station to see if I had one and if I didn't have one they weren't arresting me, they were going to help me take the measures to get one.

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[4] Petitioner does not dispute the lawfulness of the officers' entry of his business property, which was based on the arrest warrant. See *Payton*, 445 U.S. at 602-03.

[5] Petitioner asserted, and the officers denied, that one of the officers looked at a single index card. Pet. App. 13. Petitioner did not assert that the officers searched his person or his business premises in any other way.

Petitioner stated that the officers never told him he was under arrest (Ricci Dep. 38), and petitioner, according to his own testimony, did not realize he was under compulsion to go to the station (Ricci Dep. 32). Indeed petitioner testified that he did not realize he was under arrest until shortly before he was released (Ricci Dep. 38). The officers detained petitioner for approximately one hour, the amount of time needed to complete the necessary paperwork. Nothing in this series of events remotely exceeds the bounds of ordinary, prudent police work, and both lower courts so held.

Petitioner repeatedly characterizes the officers' actions as a "full custodial arrest" (*e.g.*, Pet. Br. 3, 4, 5, 24, 26) and urges that the Fourth Amendment forbids such an arrest in the circumstances presented here. But it is unclear what petitioner means by the term "full custodial arrest" and which aspect of the officers' conduct petitioner finds unreasonable within the meaning of the Fourth Amendment. Petitioner was not place in a jail or a holding cell. He was not subjected to an inventory search of the kind that is permitted when suspects are incarcerated. See *Illinois v. Lafayette*, 462 U.S. 640 (1983). He was not fingerprinted. J.A. 38. He was held in an interview room of the sort that is used by Arlington Heights police for members of the public who are not accused of crimes – such as witnesses and victims – while they wait at the station. See J.A. 32. Indeed, in his deposition, petitioner described the room in which he was held as "some kind of waiting room or something" (Ricci Dep. 33). In no other respect was he subject to physical restraint. Petitioner was released as soon as the needed paperwork was completed.

It appears that petitioner's objection is that the officers should not have transported him to the station but should instead have issued him a citation at his place of business. See Pet. Br. 25; see also ACLU Am. Br. 10 ("The police did not do anything at the stationhouse that they could not have done at petitioner's place of business."). But the Fourth Amendment surely does not require officers to process paperwork and issue a bond on the scene of an arrest, in surroundings that are unfamiliar and unpredictable. This is especially true when the Village has a consistent policy of bringing arrestees to the station, a policy based on the obviously legitimate interest in having bond applications processed – and a cash bond collected, if one is required – only by a supervisory officer at the station, rather than by officers in the field. Nor – as we explain later – can the Fourth Amendment possibly be interpreted to require police officers who have apprehended an offender on probable cause automatically to release him with no bond or security that he will appear, merely because the offense is not punishable by incarceration. See pages 32-36 below.

Even in the context of a so-called *Terry* stop – a seizure not based on probable cause (see *Terry v. Ohio*, 392 U.S. 1 (1968)) – the Court has refused to adopt a rule requiring the police to use the least restrictive means of accomplishing their objective. See *United States v. Sharpe*, 470 U.S. 675, 687 (1985). " '[T]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, in itself, render the [seizure] unreasonable.' " *Ibid.*, quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). For Fourth Amendment purposes, the only question is whether the officers' conduct was "diligent and reasonable" (*Sharpe*, 470 U.S. at

687) – a standard that the officers here clearly met. If a "least restrictive means" standard is inappropriate when officers are seizing a person without probable cause, then *a fortiori* there is no basis for such a rule when the officers have probable cause. In any event, even if such a rule were to apply, petitioner cannot explain why any action taken by the Arlington Heights officers was gratuitous.

3. Petitioner nonetheless asserts that the Fourth Amendment requires a per se rule forbidding actions like those taken by the officers in this case. But as petitioner and his supporting amici themselves demonstrate, and as we discuss more fully below (see pages 25-29), states have adopted a variety of different limitations on the power to arrest for misdemeanors and fine-only offenses; some states have allowed more flexibility to officers than others. There is no reason to homogenize all of these varied solutions into a single federal constitutional rule.

Indeed, petitioner and his supporting amici disagree among themselves about what the per se rule should be. Petitioner at one point calls for a rule "prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace[.]"[6] The court of appeals, however, held that petitioner waived the argument that the lack of a warrant was the fatal defect in his arrest (Pet. App. 8), and petitioner does not at any point in his petition or merits brief attempt to explain why that ruling was mistaken.[7] So petitioner's position must be taken be that "a

[6] This quotation is taken from the first question presented in petitioner's brief. That page is not numbered.

[7] Although petitioner's court of appeals brief twice uses the adjective "warrantless" to describe his arrest, petitioner makes no substantive argument for the proposition that a warrant should be required in cases of this kind.

full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is contrary to the Fourth Amendment" (Pet. Br. 4) – which is how petitioner himself characterizes the position he asserted in the courts below.

One amicus, however, would permit arrests in a wider variety of circumstances, calling for a rule forbidding "full custody arrests for violations of fine-only ordinances not involving a breach of the peace *or a threat to public health or safety*" (NACDL Am. Br. 3; emphasis added)[8] – an elastic category that, according to the amicus itself, includes " 'quality of life' laws" (*id.* at 14) and that could plausibly be interpreted to cover the ordinance at issue here, a licensing law designed to ensure the safety of business premises and to prevent fraud and abuse. Another amicus would forbid arrest "for fine-only offenses in the absence of exigent circumstances" (ACLU Am. Br. 3) – a category that the amicus vaguely defines as "potential harm, defiance of legal process, *e.g.*" (*id.* at 27).

The differences among the proposed rules, and their vagueness, reveal the futility of trying to use a bright-line Fourth Amendment rule in this area: arrests for misdemeanors and fine-only offenses present a very wide variety of circumstances, and any single nationwide constitutional rule will be ill-adapted to the issue. "[T]he 'touchstone of the Fourth Amendment is reasonableness' " and "[i]n applying this test [the Court] ha[s] consistently eschewed bright-line rules." *Ohio v.*

[8] "NACDL Am. Br." refers to the amicus curiae brief of the National Association of Criminal Defense Lawyers.

Robinette, 117 S.Ct. 417, 421 (1996), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). In defining the limits on police officers' power in this area, state and local governments should be permitted to pursue different approaches, allowing their officers the degree of flexibility that is appropriate to particular local conditions.

The per se rules proposed by petitioner and his supporting amici have two things in common: they purport to be validated by the common law; and they would make it substantially more difficult for police officers to arrest individuals for "minor" crimes, defined as either misdemeanors or fine-only offenses. In fact, petitioner's arguments – which find no support in this Court's decisions and have been consistently rejected by the lower courts – misunderstand both the nature of the common law rule and the relationship between the common law and the Fourth Amendment, as we demonstrate in Part C. Perhaps more important, petitioner's argument, with its implicit denigration of the need for effective enforcement of laws against so-called "minor" offenses, reflects a deep and potentially very harmful misconception of the nature of law enforcement, particularly in modern urban settings.

B. A Per Se Constitutional Limit On The Power To Arrest For "Minor" Offenses Would Seriously Undermine Important Law Enforcement Objectives.

The approach that petitioner suggests – imposing additional requirements, besides probable cause, for arrests for "minor" offenses – is not only unfounded in the Fourth Amendment; it is both impractical and unnecessary. Arrests, even for supposedly minor offenses, serve multiple important purposes. Those purposes cannot be

accommodated by exceptions for "exigent circumstances," "breaches of the peace," "quality of life offenses," "defiance of process" and the like, unless, of course, those exceptions are construed so flexibly as to render the rule meaningless.

In addition, a per se rule limiting the power to arrest for minor offenses in unnecessary. States have shown themselves willing to impose restrictions on the power of law enforcement officers to make arrests for misdemeanors and fine-only offenses, and they have imposed a variety of such restrictions that respond to local conditions. There is also a built-in check on police officers in such situations. Arrests consume far more time and resources that issuing citations, or simply warning offenders. Officers have no interest in spending those resources unnecessarily, and as a general rule will choose the less intrusive route when it is appropriate. Pretextual or harassing police conduct is, of course, an important concern, when it occurs. But a blanket prohibition on an entire category of arrests is an ill-conceived way of dealing with that concern.

Most important, however, petitioner's approach rests on the premise that the enforcement of laws against misdemeanors, or offenses punishable by fines, is a matter of relatively low social importance. This premise flies in the face of both a substantial body of social science and the gritty realities of police work.

1. Stationhouse arrests for "minor" offenses serve important law enforcement purposes.

a. Historically a central purpose of an arrest has been to ensure the suspect's presence at trial. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*

*286. Generally, of course, suspects, especially those accused of misdemeanors, are detained only until bond is set and provided. That is what happened in this case: the officers brought petitioner to the station so that the bond determination could be made by a supervisory officer.

Petitioner's approach, however, would force law enforcement agencies to choose between two unattractive alternatives in dealing with suspected misdemeanants. Either officers would issue a summons to the suspect without collecting any bond, or they would set and collect a cash bond on the scene. The first course – issuing a citation and allowing the suspect to go on his way – would, inevitably, greatly increase the numbers of suspects who do not appear for trial and escape punishment entirely. The second course – authorizing the officers collect a cash bond on the spot from the suspect – would create many severe difficulties, as we explain more fully below. There is no good reason for forcing this dilemma on law enforcement authorities.

Petitioner and the amici invoke the example of traffic violations, a class of offenses for which the authority to set bond is often delegated to officers in the field. The offender's driver's license, or sometimes a bond card provided by an organization acting as a surety, can be taken by the officer on the spot. See Ill.Sup.Ct.R. 526(a). Petitioner and the amici seem to believe that this approach should be used across the board, for all offenses punishable by fine only, or perhaps even for all misdemeanors.

But traffic violations are in this respect sui generis. A driver's license provides a suitable and widely available form of non-cash bond. When a cash bond is required, there are obvious reasons for a state or local government

not to want its officers in the field to collect cash from the suspect but instead to insist, as Arlington Heights has done here, that a supervisory officer at the station set and collect the bond. In fact, this is not simply a matter of Village policy: Illinois law specifically provides that cash bail or a bond may be accepted only in a police station or government building, and then only by certain officials. See 725 ILCS 195/1; Ill.Sup.Ct.R. 528.

Moreover, even in the case of traffic violations, it is not uncommon for officers to require the driver to accompany them to a stationhouse. This will occur when a driver does not have a license, or when the driver has only an out-of-state license. Under petitioner's approach, officers apparently would be precluded from doing this, unless the traffic offense was serious enough to be punishable by incarceration. The result would again be either that many more offenders will not appear for trial (and thus will often be able to escape prosecution), or that officers would have to set and collect bond at the scene.

Perhaps aware of this problem in the per se rule it proposes, amicus ACLU suggests (Br. 3, 27) that arrests could be allowed for any offense if there are "exigent circumstances," including "defiance of process." This is simply not a workable rule. The question whether a suspect is likely to appear for trial is exactly the question before a judicial officer at a bond hearing. It is not the sort of decision that officers in the field should be required to make at the scene of an arrest. Those officers are operating in unfamiliar and possibly threatening surroundings. The officers may know nothing at all about the aspects of the suspect's background that might make him more or less likely to abscond. But under the ACLU's

rule, if the officers resolve their doubts in favor of holding the suspect, their decision could be second-guessed at a trial in which they will face personal damages liability.

More important, officers in this situation are confronting an individual who, although at the moment suspected only of a misdemeanor, may have a serious criminal record or may be wanted on an outstanding charge.[9] Sometimes computer and communications technology will enable officers to obtain this information at the scene of the arrest. But even that will require the officers to prolong their encounter with the suspect at the scene, a course of action that is potentially dangerous; and in any event a per se rule cannot be made contingent on the availability of a certain form of technology. As this Court has recently noted, "studies suggest that as many as two-thirds of those arrested have prior criminal records, often from other jurisdictions." *Parke v. Raley*, 506 U.S. 20, 28 (1992). It will be especially difficult for officers at the scene to gain information about out-of-state records.

By bringing the suspect to the stationhouse, the officers can confirm the suspect's identity, check for any criminal record or outstanding charges, and allow the bond determination to be made in calm surroundings either by a judicial officer or by an experienced law

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[9] There are well-known examples of individuals, subsequently convicted of heinous crimes, who were first apprehended because they violated minor laws. See, *e.g.*, *Bundy v. State*, 455 So. 2d 330, 336 (Fla. 1984), cert. denied, 476 U.S. 1109 (1986) (serial murderer arrested at traffic stop); Stephen Braun, *Trooper's Vigilance Led to Arrest of Blast Suspect*, LA Times A1 (Apr. 22, 1995) (convicted Oklahoma City bomber Timothy McVeigh arrested at traffic stop).

enforcement officer to whom the authority has been specifically delegated. That is manifestly a reasonable way for officers to proceed.

This point also illustrates another important way in which petitioner's approach is unworkable. Petitioner and the amici propose that a sharp line be drawn between offenses punishable only by a fine and offenses punishable by imprisonment. But as the Court explained, in rejecting a proposal for a similar distinction in the context of *Miranda* warnings, it will often be difficult or impossible for police officers in the field to tell which category of offense they are dealing with. See *Berkemer v. McCarthy*, 468 U.S. 420, 430-31 (1984). "[T]he nature of [the] offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of [the offender's reckless conduct] dies." *Ibid.* (footnotes omitted). Thus, for example, whether possession of a weapon is a fine-only offense, a misdemeanor, or a felony, may depend upon whether it is a first or second offense and whether the offender has a prior felony conviction – information that will seldom be available at the scene.

In addition, relatively minor differences in the circumstances surrounding an offense may make a dramatic difference in the severity of the punishment. "[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person." *Berkemer*, 468 U.S. at 431 n. 13, quoting *Welsh*, 466 U.S. at 761 (White, J., dissenting). Under the municipal code of the City of Chicago, for example, trespass and possession of

burglar tools are both fine-only offenses. Chicago Mun. Code §§ 8-4-050; 8-4-180. An officer who encounters an individual prowling on another's property, with burglar tools, will be forced – under petitioner's approach – to decide whether there is probable cause to suspect the individual of burglary; if there is not, he cannot arrest the suspect but must issue a citation. Similarly, "manipulating telephone coin boxes" is a fine-only offense (§ 8-8-180); theft is not. Of course, the officer can stop the suspect on reasonable suspicion while more facts are ascertained. But if the stop lasts too long or becomes too restrictive, it may turn into an arrest. See, *e.g.*, *United States v. Sharpe*, *supra*. In all these respects, petitioner's approach unnecessarily forces officers to walk a tightrope – even though the evidence before them satisfies the traditional standard of probable cause to believe that a suspect violated the law.

Consequently, under petitioner's approach, police officers may be unable to treat an offender as seriously as his conduct and record require. They may be compelled to treat an offender who is in fact a felon as if he were a misdemeanant facing only a fine. Unless they have the ability to consult the offender's records quickly on the scene, they will be limited to issuing a citation and hoping that the offender will appear in court. Even petitioner concedes that the Fourth Amendment does not require that persons facing felony charges be treated in this way. But that is the result that petitioner's approach will often produce.

b. An arrest is also a means by which officers can assert control of a potentially threatening situation. Petitioner acknowledges that misdemeanor arrests are proper

for offenses involving a breach of the peace – thus recognizing that arrests can legitimately serve the function of maintaining order. But the concern goes well beyond offenses that themselves constitute breaches of the peace. When a person has been stopped by the police, that person – or others nearby – can become threatening even when the underlying offense itself does not involve either a felony or threatening conduct.

There are many possible examples. A gang member marking his turf with graffiti; a street vendor without a license, irate at being challenged by officers; a belligerent group blocking a sidewalk, intimidating neighborhood residents; a well-known and popular resident of a neighborhood, stopped for careless driving – all of these situations may involve fine-only offenses, but they may easily call for the police to exercise more control than they can plausibly assert by handing out citations.

This point is illustrated by the history of the common law rule permitting misdemeanor arrests for breaches of the peace. At common law, the notion of a "breach of the peace" was highly elastic: some cases held that "disobeying any act of parliament was a breach of the peace." Horace Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 574 (1923-24) (footnote omitted). In this nation, as we show below, nearly every state has, by statute, abandoned the breach of the peace limitation on the power of officers to arrest for misdemeanors. Some states have substituted a more detailed and expansive account of when misdemeanor arrests are permitted; others have recognized that no comparable limitation can be applied. Nearly all have recognized that the circumstances in which officers might justifiably need to make an arrest simply cannot be captured in a simple formula.

This Court has recognized the importance of allowing police officers at a potentially threatening scene to control the situation, even when there is no concrete reason at all to suspect a threat, and even by making a seizure unsupported by probable cause. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that police could seize an individual leaving a house where they were about to execute a search warrant. The Court noted that "no special danger to the police is suggested by the evidence in this record," but explained that the seizure was supported by "the interest in minimizing the risk of harm to the officers" because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03. In *Maryland v. Wilson*, 117 S.Ct. 882 (1997), the Court held that officers may order the passenger out of a car that has been lawfully stopped, even when there is no basis for suspecting the passenger of any offense. The Court again relied on the need for officers to " 'exercise unquestioned command of the situation' " (*id.* at 886; citation omitted). It is true that the seizures approved in *Summers* and *Wilson* will generally be less intrusive than an arrest – although there may well be circumstances in which those seizures, particularly the kind approved in *Wilson*, will be perceived by the subject as more intrusive and threatening than the brief and relatively amicable trip to the stationhouse in this case. But by the same token the officers in this case had probable cause to justify the seizure; in *Summers* there was not probable cause, and in *Wilson* no suspicion at all. In both cases the Court made clear that there was no need for the officers to make any specific showing of exigency.

c. As we noted above, petitioner has waived any argument based on a requirement that a warrant be obtained before a misdemeanor arrest. But in any event, a warrant requirement, were one to be imposed, would "constitute an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113. The Court reached this conclusion with respect to felony arrest in *Watson*, 423 U.S. at 417, and there is no reason to reach a different conclusion with respect to any other category of offenses.

In general, of course, apprehending a felon will be more important that apprehending a misdemeanant. But see *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (footnote omitted) ("[N]umerous misdemeanors involve conduct more dangerous than many felonies."). But by the same token, a felony arrest is much more intrusive. And the volume of misdemeanor arrest is vastly greater. Seeking warrants for misdemeanor arrests, or even fine-only arrests, would therefore impose a very substantial burden on law enforcement agencies, with at most limited gains.

Less obvious, but no less important, are the anomalies and distortions that would be created if a warrant were required for misdemeanor arrests but not for felony arrests. Officers who have probable cause to believe a suspect committed a misdemeanor might delay the arrest until the suspect committed a felony, so that they did not have to obtain a warrant. Often the same behavior constitutes both a major offense and a lesser offense, and officers have discretion to decide what to charge. If a warrant were required only for the less serious offense, officers would have a strong incentive to arrest offenders for felonies – thus greatly increasing the stigma, probably causing the initial detention to be harsher, and making it more difficult for the offender to obtain release on bail –

even if ordinary sound police practice would be to charge a lesser offense. And of course legislators could nullify the warrant requirement simply by reclassifying offenses or by increasing the range of possible sentences to include incarceration. No purpose would be served by inducing legislatures to do that.

Finally, a warrant requirement will of course necessitate an exception for exigent circumstances. The impossibility of defining when such circumstances exist demonstrates why a warrant requirement would be unworkable here, as it is for felony arrests. When police officers are conducting a search for evidence or contraband, it is possible to specify what constitutes exigent circumstances: essentially a significant risk that the evidence will be lost or destroyed. Arrests, however, grow out of a face-to-face confrontation between the police and a suspect – often with others present, either members of the public or intimates of the suspect – and such a situation is almost always more fluid and multi-faceted than that involved in a search for evidence. What might begin as a polite encounter between a citizen and an officer may escalate into a situation requiring an arrest. The police may arrive at a scene with the intention only of investigating but then determine that an arrest is in order. Officers with probable cause might initially plan only to warn the suspect but then discover that a hostile crowd has gathered and an arrest is needed. Officers who initially believe that a citation and summons will be sufficient might decide, after seeing the suspect's reaction, that the danger of his absconding is too great and an arrest is in order. When officers are confronted with such a wide array of potentially threatening circumstances, it

would seriously inhibit effective law enforcement to subject them to second-guessing on the ground that they might have anticipated the events that occurred and obtained a warrant.

2. A nationwide constitutional limit on arrests for fine-only offenses is both unnecessary and harmful in view of the valuable diversity of approaches among the states.

a. Petitioner and his supporting amici detail numerous state laws governing arrests for misdemeanors and fine-only offenses; they suggest that these laws show that this Court should adopt a nationwide per se rule as a matter of constitutional law. In fact the variety of state laws shows exactly the opposite.

To begin with, in very few states would the arrest in this case have been unlawful.[10] Petitioner and his supporting amici, in their surveys of state law, appear to claim at most that eight states forbid arrests for fine-only offenses. ACLU Am. Br. 15 n. 17. Both petitioner and the amici assert that many states still generally endorse the rule that misdemeanor arrests may be made only for offenses committed in the officer's presence. Pet. Br. 14-21; ACLU Am. Br. 15-17. But as the lower courts found, and as we show below, the offense here *was* committed in the officers' presence. Thus it appears that petitioner's approach would have the effect of declaring unconstitutional, in whole or part, the laws of at least 42 states, even on petitioner's account.

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[10] The various state laws governing arrests are surveyed in Part II B of the Brief for the National League of Cities, et al., as amici curiae.

What is most striking about state law on this subject, however, is how it is both highly varied and highly complex. Even among states that seem to retain the "presence" requirement, there is a multifarious pattern of exceptions. And states that seem sympathetic to petitioner's view in fact allow law enforcement authorities a great deal of flexibility.

California's statute is an example. Cal. Penal Code § 853.6 begins by stating, superficially in keeping with petitioner's general approach, that "[i]n any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance * * * that person shall * * * be released" with a citation. But the statute then immediately provides an important exception, for domestic violence cases:

> In any case in which a person is arrested for a misdemeanor violation of a protective court order involving domestic violence * * * the person shall be taken before a magistrate instead of being released according to the procedures set forth in this chapter, unless the arresting officer determines that there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested.

Recognizing, however, the difficulty of defining such an "exigent circumstances" exception, the statute directs "each city, county, or city and county [to] develop a protocol to assist officers to determine when arrest and release is appropriate, rather than taking the arrested person before a magistrate."

The statute then goes on to provide a number of additional, substantial exceptions to the requirement of proceeding by citation (Cal. Penal Code § 853.6(i); emphasis added):

> Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter *unless* one of the following is a reason for nonrelease * * * :
>
> (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
>
> (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
>
> (3) The person was arrested under one or more of the circumstances listed in Sections 40302 [which includes the failure to produce satisfactory evidence of one's identity] and 40303 [which enumerates sixteen motor vehicle offenses] of the Vehicle Code.
>
> (4) There were one or more outstanding arrest warrants for the person.
>
> (5) The person could not provide satisfactory evidence of personal identification.
>
> (6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
>
> (7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

The complexity of this and many other state statutes, and the variety among state statutes, are significant for a number of reasons. First, they reveal that this is the kind of issue that can be readily addressed through the political process in each state and locality. Only a very small percentage of the population is subjected to the kinds of police conduct that this Court has traditionally limited by strict prophylactic rules – for example, searches of residences and custodial interrogation. But nearly everyone would be threatened if police had an excessively broad power to arrest for minor offenses, and the legislators have responded accordingly. Petitioner makes much of the fact that most states "circumscribe an officer's power to make a warrantless arrest in non-felony cases." Pet. Br. 13 (footnote omitted). Contrary to petitioner's suggestion, however, that is a reason for this court *not* to intervene. The profusion of state statutes shows that democratically elected legislators are fully able to address this issue. Cf. *Robinette*, 117 S.Ct. at 421-22 (Ginsburg, J., concurring); *id.* at 427-28 (Stevens, J., dissenting).

Moreover, the variation and complexity in these statutes shows that a single nationwide rule is unlikely to work. Circumstances differ from state to state. "Minor" offenses in urban areas are often not minor at all; as we explain below, important policing strategies emphasize the crucial need to enforce the laws against supposedly minor crimes very vigorously. Those crimes can have a

profound effect on urban neighborhoods. Indeed, the effective enforcement of laws against "minor" offenses may be the single best way of reducing the number of very serious offenses. But predominantly rural states are faced with different circumstances. There, minor offenses may have less of an impact on others, and the distance that an arrestee must travel to the police station may be much greater. As California's statute shows, states may have very specific ideas about what constitutes the kind of exigency that requires an arrest rather than a citation, and specific ideas about how to implement the regime they have defined. Given these conditions, and the states' responsiveness to them, it would be artificial – and potentially destructive of valuable state and local experimentation – to insist on uniformity as a matter of federal constitutional law

b. In addition, this is an area in which the incentives of police officers will not generally be at odds with the constitutional values at stake. Traditionally when the Court has adopted per se rules limiting police conduct, it has done so in order to counteract the systematic tendency of "zealous officers" to be too aggressive while "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Thus the Court requires search warrants because officers on the trail of crucial evidence may be too quick to decide that they have probable cause for a search; the Court requires *Miranda* warnings because officers who have a suspect in custody may, in their zeal to solve the crime, overreach and use coercive interrogation tactics. In these situations and others, officers who are zealously trying to enforce the law may have some tendency to infringe constitutional values.

But police officers and police departments have no systematic interest in making unnecessary arrests for misdemeanors and fine-only offenses. On the contrary, they have every reason to use citations – or warnings – whenever possible. Arrests are time-consuming and generally force officers to do much greater amounts of paperwork – thus detracting from their "competitive enterprise of ferreting out crime." For this reason, officers zealously engaged in that enterprise are likely to *avoid* arresting individuals for less serious offenses, whenever they can conscientiously do so.[11] This is no doubt one reason that state and local governments have limited officers' authority to make arrests for misdemeanors. And for this reason, too, this Court's intervention here is unwarranted.

c. We do not overlook the possibility that the power to arrest people for misdemeanors or fine-only offenses might be used pretextually or for purposes of harassment. Petitioner's own self-serving claims of harassment in this case are belied both by the circumstances of the arrest and by the fact – not only conceded but emphasized by petitioner – that the arrest was made pursuant to a uniformly applied Village policy. Nonetheless, it is certainly possible to imagine cases in which the power to

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[11] The contrast with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), is illuminating. Once an offender has been jailed, both bureaucratic inertia and the desire to investigate further might lead to an excessively long confinement. For this reason the court established a presumption that the Fourth Amendment is violated when an arrestee is confined for more than 48 hours without appearing before a judicial officer. By contrast, an officer who can, consistent with his or her duties, escape the paperwork of taking a person into custody is likely to do so whenever possible.

arrest for a misdemeanor or fine-only offense might be used for improper purposes.

An across-the-board prohibition of an entire category of arrests would, however, be a much too far-reaching way of addressing this issue. Nowhere do police officers enjoy more discretion than in deciding whether to stop vehicles for traffic offenses, since traffic laws are so detailed and violations are so ubiquitous. But this Court – recognizing both the complexity of the situations involved and the ability of state and local governments, including state courts, to address the issue – has consistently refused to adopt per se rules to limit police discretion and reduce the danger of harassment and pretext. See *Whren v. United States, supra; Ohio v. Robinette, supra.* Indeed the Court has, if anything, enlarged the authority of police officers to take steps to control the situation that arises after a traffic stop. See *Maryland v. Wilson, supra; Pennsylvania v. Mimms,* 434 U.S. 106 (1977).

An individual who believes police officers have acted improperly is free to invoke the remedies made available by state and local governments – which, as we have noted, have shown their ability to limit officers' authority. Beyond that, an individual can attempt to show that the manner of an arrest was abusive; that he was held for an excessively long time before a probable cause determination; or that he has been singled out for prosecution on an impermissible basis. Broader federal constitutional limitations, of the kind petitioner seeks, would only hamper law enforcement efforts while, in all likelihood, having little if any effect on police officers who are genuinely unscrupulous and bent on harassment.

3. Effective police work against so-called minor offenses is a crucial law enforcement priority.

a. Perhaps the deepest flaw in petitioner's argument is his implicit premise that little harm is done if the enforcement of laws against "minor" offenses is curtailed. One of the most significant developments in criminology in recent years has been the renewed emphasis on the vigorous enforcement of laws against so-called minor crimes. This emphasis is supported by recent social science studies showing that the prevalence of minor crimes can have a devastating effect on a community. See, *e.g.*, Wesley G. Skogan, *Disorder and Decline* (1990); George Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 U. Va. L. Rev. 349 (1997).

The minor crimes that fall into this category include many offenses that are typically punishable by fines only: "noisy neighbors, accumulating trash, poorly maintained buildings, and sundry problems related to congregating bands of youths" (Skogan, *Disorder and Decline* 2) as well as "vandalism, aggressive panhandling, public drunkenness, unlicensed vending, public urination, and prostitution" (Kahan, 83 U. Va. L. Rev. at 368). Many of these offenses would not constitute breaches of the peace at common law. That is certainly true of, for example, code violations relating to trash, building conditions, and street vending. But it appears also to be true of "talking loudly in the street in the presence of an officer, who ordered the parties to be quiet"; " 'turning toward the wall for a particular purpose' of relief"; "obstructing the free passage across a bridge; or refusing to move on, on a sidewalk, at the request of an officer": none of those

offenses was viewed as a breach of the peace that would justify a misdemeanor arrest. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 673, 703-04 (1923-24) (footnotes omitted). Prostitution and panhandling also may not be breaches of the peace.

There is powerful evidence that offenses of this kind are not just annoyances; they are one of the leading causes of the disintegration of urban communities. For example, one study, based on 40 urban areas with differing crime rates, found a high correlation between "disorder" – defined in large part by the presence of low-level crimes[12] – and serious crime. The high correlation persisted even after controlling for the effects of poverty, racial composition of the neighborhood, and neighborhood instability. Skogan, *Disorder and Decline* 73, 75. Disorder also correlated with perceptions of violent crime (*id.* at 74-75) and instability in the neighborhood housing market (*id.* at 84).

Law enforcement officers should be permitted to combat these widespread but severely damaging minor offenses in the way they traditionally combat crime: by making arrests if there is probable cause. The regime that petitioner advocates is simply not a practical alternative. Obtaining a warrant is a time-consuming effort that will

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[12] "Disorder" was measured by a surveys that asked about "problems with groups of loiterers, drug use or sales, vandalism, gang activities, public drinking, and street harassment" as well as "building abandonment, garbage or litter on streets and sidewalks, and junk and trash in vacant lots." Skogan, *Disorder and Decline* 51. All of these categories of disorder involve offenses, many of which (especially the code violations associated with the latter group) will typically be punished only by fines. In addition, none of those in the latter group constitutes a traditional breach of the peace.

make it virtually impossible to enforce these laws on a large scale. A citation issued to a perpetrator of one of these offenses will often be ignored.

Indeed officers might be better advised to do nothing instead of issuing a futile citation and heightening the impression that the law cannot be effectively enforced. The point of enforcing the law against offenses of this kind is to dispel the impression that a community is in a state of decline, in which the law is widely disobeyed with impunity. See Kelling and Coles, *Fixing Broken Windows* 20 ("[D]isorderly behavior unregulated and unchecked signals to citizens that the area is unsafe. * * * Ultimately the result for such a neighborhood, whose fabric of urban life and social intercourse has been undermined, is increasing vulnerability to an influx of more disorderly behavior and serious crime"). If officers cannot move against offenders swiftly, effectively, and on a large scale, their efforts may be not only vain but counterproductive.

Of course this does not justify dispensing with the traditional requirements of probable cause and reasonableness. And state and local statutes and judicial decisions will still restrain police officers. But at a time when the control of so-called minor offenses has come to be seen as a matter of great importance and urgency, it would be inopportune to preempt state and local efforts with a new, inflexible Fourth Amendment rule.

Amicus NACDL insists (Br. 14) that "quality of life" crimes would constitute an exception to the proscription on arrests for fine-only offenses. But it makes little sense to establish a supposed rule against arrests for such offenses, only to allow a broad and ill-defined exception that will lead to litigation and cause police officers to

hesitate in doing their jobs. Consider, for example, the following offenses, all of which are punishable only by fines under the Municipal Code of the City of Chicago:

- trespass (§ 8-4-10)
- vagrancy (§ 8-4-100)
- damages to public property (§ 8-4-120)
- possession of paint or marker with intention to deface (§ 8-4-130)
- throwing objects on an athletic field (§ 8-4-190)
- soliciting for prostitution (first and second offenses) (§ 8-4-130)
- indecent exposure (§ 8-8-080)
- gambling (§ 8-12-010)
- drinking by minors (§ 8-16-050)
- possession of alcohol by a minor, or delivering alcohol to a minor (§ 8-16-060)
- possession of spray paint or marker by a person under 18 (§ 8-16-096)
- discharge of a firearm (§ 8-24-010)
- defacing public property (§ 10-8-380)
- noise violations (§ 10-4-1110)
- throwing objects in public places of amusement (§ 7-28-180)
- smoking in public conveyances (§ 7-32-020)

It is difficult to see why all of these should not be considered "quality of life" offenses – as should many instances of operating an unlicensed business. All of them concern conduct that can seriously undermine the quality of life in an urban environment. The way to deal with these offenses is to allow officers to act as the Fourth Amendment permits – to arrest on probable cause – and to allow state and local regulation (along with simply the press of police work) to provide the necessary check on

police, rather than to adopt a prophylactic rule that is likely to produce unfortunate consequences.

b. The most basic error of petitioner's approach lies in the assumption that, as amicus ACLU puts it (Br. 21), it is unfair "to allow detention at the sole whim of the police for an offense that could not have led to incarceration upon conviction." Of course petitioner was detained on the basis of probable cause, not at the "whim' of the police. More fundamentally, however, this argument misconceives the relationship between arrest and punishment. An arrest is not part of the punishment for an offense; it would violate the Constitution to use a period of detention (or any other sanction) to punish *any* suspect who has not been convicted, no matter how serious the offense with which he is charged. An arrest serves the purposes of ensuring a suspect's appearance at trial and preserving order at the scene of the offense. Those purposes may furnish as strong a justification for an arrest in a case involving a fine-only offense as in a case involving an offense that can lead to imprisonment.

The punishment that a legislature designates for an offense is a function of many factors unrelated to whether it is appropriate to arrest a suspect. A legislature may, for example, choose to punish an offense solely by a fine not because it considers the offense to be less serious but because the class of offenders is likely to be highly responsive to economic incentives. This will often be true of environmental offenses, which are prompted by simple economic calculation on the part of the offender and which can be deterred if they are made unprofitable. See, *e.g.*, Chicago Mun Code § 7-28-390 (unauthorized dumping on a public way punishable by fine only).

Alternatively, the decision to punish an offense by a fine may reflect the legislature's view that the offense, while serious, does not require incapacitation. Or the decision to make an offense punishable only by a fine may simply reflect a legislative determination that incarceration – a harsh and expensive punishment – should be used only for the most dangerous or hardened offenders, and that those who commit, for example, environmental offenses or criminal fraud are not such offenders. See, *e.g.*, Chicago Mun. Code § 4-72-170 (offenses relating to the licensing and inspection of day care centers punishable by fine only); Chicago Mun. Code §§ 4-144-210, 8-24-060 (certain weapons offenses punishable by fine only); Chicago Mun. Code § 4-60-200 (regulations of establishments with liquor licenses punishable by fine only).

In all of these cases, the reasons for arresting a suspect – in particular, the need to make sure he will appear at trial – are very strong. Indeed, if the legislature is relying on economic incentives to deter people who are committing crimes simply out of calculation, and not impulsively, a credible threat of enforcement is crucial. The fact that the offense is not punishable by incarceration has no bearing on how important it is that the law be effectively enforced.

C. Traditional Common Law Limitations, To The Extent They Are Incorporated In The Fourth Amendment, Do Not Invalidate The Arrest In This Case.

1. Petitioner and his supporting amici rely on what they characterize as the "common law rule" that a warrantless arrest for a misdemeanor is permissible only

when the offense occurs in the presence of the arresting officers and involves a breach of the peace. See, *e.g.*, Pet. Br. 9-11. As we explain below (pages 46-48), to the extent this common law rule survives as a traditional limitation on the authority of police offices, it survives only as to the requirement that a misdemeanor occur in the arresting officer's presence; the limitation to cases involving breaches of the peace has not survived. As both courts below found, petitioner's offense in this case *did* occur in the presence of the officers (Pet. App. 6, 18) – thus making the arrest lawful even under the common law rule.

More fundamentally, however, the common law principle on which petitioner relies is not among those that have been incorporated into the Fourth Amendment. Rather, common law limits on the power to arrest apply only in the absence of a statute further expanding an officer's authority. " '[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states.' " *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting), quoting Edward Fisher, *Laws of Arrest* 130 (1967).

a. Even in the heyday of the common law, public officials were authorized by statute to make warrantless arrests for non-felonies that were not breaches of the peace. Hawkins's *Pleas of the Crown* gives this account:

> As to the power of watchmen, it is farther enacted by the said *statute of Winchester*, c. 4, "That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff * * * shall keep

> him safely until he be acquitted in due manner. * * * "

3 William Hawkins, *A Treatise of Pleas of the Crown* (1795), ch. 13, § 5 at 173. Hawkins states that this statute also authorized bailiffs " 'to make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons' " the bailiffs "may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, until he shall give a good account of himself." *Id.*, § 12 at 178. In the case of both the watchmen and the bailiffs, these are arrests without "process from some court of record." *Id.* at 172.

Blackstone gives a similar account, again discussing arrests "without warrant" (4 *Blackstone's Commentaries* *289; italics omitted):

> Watchmen, either those appointed by the statute of Winchester, 13 Edw. I c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to constables, may *virtute officci* arrest all offenders, and particularly nightwalkers, and commit them to custody until morning.

The reason for this statutory enlargement of the common law authority sheds light on the Fourth Amendment issue today. At common law, arrests for misdemeanors – limited, in the absence of a warrant, to breaches of the peace committed in the officer's presence – were "made not so much for the purpose of bringing the offender to justice as in order to preserve the peace" (I James Fitzjames Stephen, *A History of the Criminal Law of England* 193 (1883); see *Carroll v. United States*, 267 U.S. 132, 157 (1925)). In a largely rural society with little mobility, in which the inhabitants of villages knew each other well,

there was little concern about the risk of a misdemeanant's escaping. But strangers presented a greater problem. Accordingly, by statute, public officials were authorized to arrest a stranger, without a warrant, on suspicion, and hold him until the matter was resolved.

Today, of course, the case of the stranger who might flee – an exception at common law – has become the rule. The leading authorities have, accordingly, viewed the statutory expansion of the common law power to arrest as eliminating an archaic "handicap to our modern law enforcement officers [that] presents a formidable obstacle to protection of the public." Fisher, *Laws of Arrest* 128.

b. In the United States, it has consistently been understood that the common law arrest power can be enlarged by statute. *Kurtz v. Moffitt*, 115 U.S. 487 (1885), which appears to be the earliest case in which this Court invoked the common law rule, makes this clear. The issue in *Kurtz* was whether local police officers had the power to arrest an alleged deserter from the army. The Court stated: "If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, that right must be derived either from some rule of the law of England which has become part of our law, *or from the legislation of Congress*." *Id.* at 498 (emphasis added). The Court then, after stating and applying the common law rule and English statutes, carefully considered American statutes as well. *Id.* at 498-505. The Court nowhere suggested that the federal legislation enlarging the common law authority might violate the Fourth Amendment.

Bad Elk v. United States, 177 U.S. 529 (1900) – the next case in which this Court applied the common law principle – demonstrates the same point. In *Bad Elk*, the Court held that a trial judge erred in instructing a jury that

police officers had acted lawfully in attempting to arrest the defendant, who was convicted of murder on an Indian reservation for killing one of the officers. In reaching its conclusion, the court first reviewed the common law rule and concluded that the attempted arrest did not comply with it. *Id.* at 534-35.

The Court then proceeded, however, to consider whether there was a state or federal statute "giving any right to [the decedent] to arrest an individual without a warrant, on a charge of misdemeanor not committed in [his] presence." 177 U.S. at 535. After reviewing the applicable statutes in detail, the Court concluded that they also did not authorize the arrest. *Id.* at 535-56. On petitioner's theory – that the common law establishes a constitutional minimum – the court's examination of the statutes is inexplicable. See also *Johnson v. United States*, 333 U.S. 10, 15 & n. 5 (1948) (stating without qualification that "[s]tate law determines the validity of arrests without warrant" in a case in which state law departed from the common law rule.)

The common law rule was, therefore, understood only to provide a limitation that, like other common law doctrines, can be altered by statute. It is because of this understanding that, for over 200 years, this Court " 'has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.' " *Watson*, 423 U.S. at 417-18, quoting *Gerstein*, 420 U.S. at 113. Indeed the lower courts and commentators have considered it axiomatic that, whatever additional restrictions might apply under state common or statutory law, the Fourth Amendment permits a suspect to be arrested on probable cause – for *any* offense. See, *e.g.*, *Allen v. City of Portland*, 73 F.3d 232, 236 n. 2 (9th Cir. 1995) ("A

warrantless misdemeanor arrest which violates state law does not implicate the Fourth Amendment unless there is no probable cause"); *United States v. Smith*, 73 F.3d 1414, 1416 (6th Cir. 1996); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant [to arrest] for misdemeanors not occurring in the presence of the arresting officer."); *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n. 2 (9th Cir. 1990); *Fisher v. Washington Area Metropolitan Transit Authority*, 690 F.2d 1133, 1138-39 & n. 6 (4th Cir. 1982). One of the leading cases in the area holds (*Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974)):

> The Fourth Amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

And the leading treatise states flatly:

> As for the common requirement of a warrant for misdemeanors not occurring in the presence [of the arresting officer], it is likewise not grounded in the Fourth Amendment. * * * [T]he presence test is not mandated by the Fourth Amendment.

3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed. 1996) § 5.1(b) at 21, 23.

c. There is no basis for any suggestion (see, *e.g.*, NACDL Am. Br. 4) that because petitioner's offense is punishable only by a fine, not by jail, it would not have been treated even as a misdemeanor at common law. Many offenses at common law were punished by fines – including some that are quite similar to petitioner's. A first offense of provision of unwholesome goods was

punishable by an "amercement" (4 *Blackstone's Commentaries* *162). "[O]ffensive trades and practices" were a species of public nuisance punishable by a fine. *Id.* at *167. "[S]tage-plays unlicensed" were also a public nuisance, subject to fine and suppression. *Id.* at *168. The "making and selling of fireworks and squibs" (*ibid.*) was treated in the same fashion. Obstructing highways, bridges, or rivers, was also punishable by fines. *Id.* at *167.

Amicus NADCL misleadingly argues that offenses like petitioner's were "similar to summary offenses" and asserts that "the common law did not allow for arrests" for such offenses. Br. 4. Summary offenses, however, were not creatures of the common law; they were simply those offenses that, by act of Parliament, were to be tried without a jury. 4 *Blackstone's Commentaries* *277. They were "so numerous, and of such a varied character, that it would be practically impossible * * * to give anything like a full account of them within any moderate compass." III Stephen, *History of the Criminal Law of England* 263. These were not just minor offenses; they included, for example, "all trials of offences and frauds contrary to the laws of the excise, and other branches of the revenue" (4 *Blackstone's Commentaries* *278) as well as offenses like disorderly conduct (*ibid.*). The punishments they assessed were by no means limited to fines; they could impose corporal punishment on the defendant. *Id.* at *278, *280.

Blackstone – whose stature among the colonists was, of course, unparalleled – *criticized* the summary courts for not arresting the defendant. It is a virtue of the common law courts that they "never suffer[ ] any fact * * * to be tried, till [they] have previously compelled an appearance by all concerned." 4 *Blackstone's Commentaries* *280. It was

the common law courts that insisted the summary courts summon the accused, rather than proceeding ex parte. *Id.* at *279. Blackstone also, of course, criticizes the summary courts for not using a jury. *Id.* at *277-78. In all of these respects, the practice of the summary courts simply sheds no light on the treatment of offenses like petitioner's at common law.[13]

It is clear, however, that American courts, from the beginning of the nineteenth century, authorized warrantless arrests for violations of regulatory ordinances like the one petitioner violated:

> It is impossible to classify or enumerate the great number of such misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations; Sunday traveling or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty to animals, vagrancy, drunkenness, disturbances in school houses, or at elections * * *

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[13] Amicus NACDL also argues that petitioner's offense is civil in nature under Illinois law. This claim has never been part of petitioner's argument, and in any event appears foreclosed by *Whren v. United States*, *supra*, which involved a "civil traffic stop" (116 S.Ct. at 1771) that the Court treated indistinguishably from stops that technically involved criminal violations. See *id.* at 1774 (noting that *United States v. Robinson*, 414 U.S. 218 (1973) involved a "traffic-violation arrest (of the sort here)").

We note that amicus's discussion mischaracterizes Illinois law in certain respects as well. *People v. Datacom Systems Corp.*, 585 N.E.2d 51 (Ill. 1991), for example, concerned the status of fines for municipal parking violations under the Illinois Collection Agency Act – not for any purpose having to do with criminal law enforcement. See *id.* at 56-60.

Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. at 706-07. Indeed, the law review article from which amicus NACDL adapts its discussion acknowledges that with "the advent of a professional police force * * * arrest rules began to change. Legislatures then adopted statutes granting sweeping arrest powers [and] * * * authoriz[ing] custodial arrests * * * 'for many ordinance and regulatory violations, that had previously not been subject to arrest at all.' " Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 258-59 (1989) (footnotes omitted). It simply cannot be claimed, therefore, that there is a tradition of precluding arrests for offenses like petitioner's.

2. a. Even if the common law limits on an officer's power to arrest are understood to specify constitutional requirements, and are not subject to modification by statute, petitioner is still not entitled to prevail. This Court " 'has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.' " *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), quoting *Payton*, 445 U.S. 591 n. 33. In determining whether the Fourth Amendment incorporates a common law principle, the Court has considered not just the historic common law practice but whether there is "a clear consensus among the States adhering to that well-settled common law rule." *Payton*, 445 U.S. at 590, citing *Watson*, 423 U.S. at 421-22. At the most, the common law principles apply when they "ha[ve] been generally adhered to by the traditions of our society" (*County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)). See, *e.g.*, *Wilson v. Arkansas*, 514

U.S. 927, 933 (1995) (citations omitted) (common law limitation "was woven quickly into the fabric of early American law" and "is 'embedded in Anglo-American law.' ").

The common law rule limited the privilege to arrest to cases in which the offense (i) was committed in the officer's presence and (ii) constituted a breach of the peace. It is entirely clear that only the first of these limits has survived in American law. The requirement that a misdemeanor arrest can be made only for a breach of the peace has been widely disavowed in this country.

On this point the authorities are unanimous. "As a general rule it may be said that the modern peace officer has authority to arrest without a warrant for any public offense committed in his presence, *and this includes city ordinance violations.*" Fisher, *Laws of Arrest* 130 (1967) (emphasis added; footnote omitted). See, *e.g.*, 3 LaFave, *Search and Seizure* §5.1(b) at 13-14 ("By far the most common statutory provision removes the breach of the peace limitation and thereby permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence.") (emphasis in original; footnote omitted); *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n. 2 (9th Cir. 1990) ("court cases and statute[s] * * * allow arrest for *any offense* committed in the presence of the police officer. * * * This practice has never been successfully challenged and stands as the law of the land.") (emphasis in original).

One recent survey concludes that "[o]nly a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer's presence, and even these permit some minor exceptions." William A. Schroeder, *Warrantless Misdemeanor*

Arrests and the Fourth Amendment, 58 Mo. L. Rev. 771, 784 (1993) (footnotes omitted). In addition, "many jurisdictions * * * authorize warrantless arrests for misdemeanors not committed in the arresting officer's presence if specified circumstances exist or if the arrest is for specified misdemeanors" (*id.* at 777-78), and "the trend away from the common law rule has accelerated" (*id.* at 785).

Similarly, the ALI Model Code of Pre-Arraignment Procedure, on which the Court has relied in determining the scope of Fourth Amendment limits on the power to arrest (*Watson*, 423 U.S. at 422), permits an arrest "for a misdemeanor or petty misdemeanor in the officer's presence" and for a misdemeanor if the officer reasonably believes that the person may escape apprehension or may injure others. See *id.* at 422 n. 11. Petitioner and his supporting amici attempt to paint a different picture, but, as we have noted, they are unable to identify more than a handful of states that retain anything more than the requirement that the offense be committed in the officer's presence. See Pet. Br. 13-21; ACLU Am. Br. 12-17.

In keeping with the American rejection of the breach of the peace element, this Court's descriptions of the common law rule have, for the most part, simply omitted that requirement. See, *e.g.*, *Watson*, 423 U.S. at 418 ("the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence"); *Bad Elk v. United States*, 177 U.S. at 534 ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz v. Moffitt*, 115 U.S. at 498-99 ("By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime

not committed in his presence, except in the case of felony").

b. Thus, even if the common law rule governing misdemeanor arrests is understood as a constitutional limitation, the part of the common law principle that has taken root in American law permits – at the very least – warrantless misdemeanor arrests, on probable cause, for any offense committed in the officer's presence. It follows that, even if the common law rule – as it has evolved – is incorporated into the Fourth Amendment, petitioner's arrest was lawful: his offense was committed in the arresting officers' presence, as both lower courts found. Pet. App. 6, 15-16.

Even petitioner is forced to concede that this finding is "literally correct" (Pet. Br. 14 n. 16). The Arlington Heights ordinance makes it "unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business" without a license. The officers saw a business office set up to conduct telephone solicitations, with telephones on employees' desks (J.A. 45; Ricci Dep. 16-20); there were employees on the premises (J.A. 45; Ricci Dep. 16-17); petitioner admitted to the officers that he was engaged in telemarketing (J.A. 64); petitioner failed to produce a business license when the officers requested it (J.A. 64-65); and the officers themselves had searched the public records and not found any such license (J.A. 70). It is difficult to imagine what else petitioner would have had to do in order to violate the ordinance in the officers' presence.

Petitioner's only apparent answer to this point is that the "presence" requirement requires that "the wrongdoing be readily apparent to the officers" and "that petitioner did not have a license did not become readily

apparent until petitioner searched for, and did not locate, the license" (Pet. Br. 14 n. 16) – but of course petitioner did those things in the officers' presence. In addition, the officers themselves had had the public records checked. "If one is apprised by any of his senses that a crime is being committed; knows it by the evidence of his own senses; has direct personal knowledge through his sight or hearing or other sense of it, whereby he is able to detect it as the act of the accused, – it is 'in his presence' " (Wilgus, 22 Mich. L. Rev. at 680; footnotes omitted). By this standard the presence requirement was plainly satisfied here. In any event, "the in presence requirement is satisfied when a person admits to the police that he is presently violating the law" (3 LaFave, *Search and Seizure* §5.1(c) at 24 (citing cases)); petitioner acknowledged that he was operating a business enterprise, and he was unable to produce a license.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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